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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CECILIA GONZALEZ, Plaintiff and Appellant, v. IHG MANAGEMENT (MARYLAND) LLC, et al., Defendants and Respondents.	B215952 (Los Angeles County Super. Ct. No. BC387709)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

Irving Meyer for Plaintiff and Appellant.

Seyfarth Shaw, Raymond R. Kepner and Laurie E. Barnes for Defendants and Respondents.

After appellant Cecilia Gonzalez (Gonzalez) was terminated from her cashier position with IHG Management (Maryland) LLC (IHG), she sued IHG and David Nader (Nader), her supervisor, for sex discrimination, sexual harassment and termination in violation of public policy based on her pregnancy.[1] The trial court granted summary judgment for IHG and Nader after concluding that Gonzalez was terminated for misappropriating tips. Gonzalez appeals on the grounds that she presented sufficient evidence of discriminatory animus and pretext to proceed with her discrimination claim. We find no error and affirm.

FACTS[2]

Background

IHG hired Gonzalez on September 19, 2007, as a cashier for the Starbucks take-out counter located in the lobby of the Crowne Plaza LAX (hotel). Gonzalez was informed of IHG's policies, including that the misappropriation or mishandling of hotel property could lead to discipline or termination. She reported to Victoria Roberts (Roberts), Adrille Renanza (Renanza) and Nader, the Food and Beverage Director. A "MICROS" card was assigned to Gonzalez. She used it to operate the cash register. In addition, as her cash register log-in number, Gonzalez was assigned number 317.

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[1] Pregnancy discrimination qualifies as sex discrimination under Government Code section 12940. (Cal. Code Regs., tit. 2, § 7291.5.)

[2] Consistent with our obligation to resolve all conflicting evidence and inferences in favor of a party opposing summary judgment, we state the facts in the light most favorable to Gonzalez. (*ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 141 ["In reviewing an order granting summary judgment, we must . . . redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment"].) Our statements of the facts shall in no way be considered a factual finding, nor shall it give rise to res judicata, collateral estoppel or in any way foreclose litigation of factual issues.

At the time, the hotel had an agreement with various airlines to accommodate passengers with delayed or canceled flights. The hotel provided the passengers with a room and a voucher to be used for a meal. Karensa Christenson (Christenson), a member of the hotel's accounting department, reviewed voucher transaction receipts and then compiled them to send to the airlines for reimbursement. She would briefly glance at voucher receipts to ensure that they did not include nonreimbursable charges for alcohol or unauthorized gratuities. If a voucher transaction had an unauthorized charge, the hotel suffered a loss.

Roberts instructed Gonzalez how to process voucher transactions and explained that different vouchers contained different amounts for tips. If a voucher provided $0.00 for a tip, no tip was authorized. When a customer wanted to spend less than the full voucher amount, Roberts and Renanza told Gonzalez to ring up more items than were ordered. For example, if a customer only wanted to spend $2, Gonzalez was told to ring up, inter alia, pizza or drinks. In this way, the hotel was able to ensure that the entire amount of the voucher would be used in the transaction and reimbursed.

Gonzalez earned $10 an hour. It was typical for her to earn $15 to $28 in cash register tips. On a really busy night, however, she could earn more than $40. She also got tips from a tip bucket.

The hotel was rife with misconduct. When the hotel was slow, the supervisors ate food from the hotel buffet and ordered food from the kitchen. The employees were not permitted to eat the hotel's food because the hotel considered it stealing. One of Gonzalez's supervisors would take an energy drink from Starbucks, hide it in his pocket to avoid the surveillance camera, and then consume the drink in the kitchen. Roberts regularly mishandled money. She often came up short on her cash register and did not give customers change.

Initially, Nader was friendly toward Gonzalez. He would stop by her station and they would have long conversations. Renanza was also friendly. But then, in mid-November 2007, Gonzalez told Renanza that she was pregnant. He said, "Don't tell [Nader], because he is going to get upset." Renanza added, "I know when to tell him[] so

he won't get upset." He told Gonzalez that he liked her, not to worry, that he would convince Nader not to do anything about her pregnancy. However, once Renanza informed Nader that Gonzalez was pregnant, both Renanza and Nader changed their attitude toward Gonzalez. Not only did Nader stop talking to Gonzalez, he would not even look at her. If he saw her, he would turn the other way. Renanza limited all conversation to work topics.

A few days after revealing that she was pregnant, Gonzalez asked Renanza to change her schedule because she was having difficulty with morning sickness. He said he would speak to Nader. Subsequently, Renanza said he spoke to Nader and that Nader got mad. Even though Renanza thought it would be a good idea for Gonzalez to speak to Nader, he told her not to. Instead, he told her to go to human resources, disclose her pregnancy to Nola Jarecki (Jarecki), and get the forms that Gonzalez would have to submit to her doctor.

When Gonzalez went to the human resources department, she could not find Jarecki. The second time Gonzalez went to the human resources department, she saw the Director of Human Resources, Diane LeSage (LeSage). Gonzalez disclosed her pregnancy to LeSage and asked if she needed to fill out any paperwork so that she could take time off. LeSage gave Gonzalez the forms and said she could take up to seven months off. Gonzales said that she would only need three months. LeSage asked how Gonzalez felt about having a baby and Gonzalez said she was nervous. LeSage told Gonzalez that everything would be okay. In the third week of December 2007, Gonzalez's schedule was changed.

During one of Gonzalez's shifts, Roberts reviewed a voucher transaction and saw an $8 tip. She asked Gonzalez if she had charged the tip to the voucher. Gonzalez said that she did not because the voucher did not permit a tip. She conveyed her belief that the tip had been automatically added by the cash register system. Roberts voided the transaction and then reprocessed it.

On January 13, 2008, Gonzalez clocked in at 5:55 p.m. The Starbucks counter was "a little busy" both before and after her meal break. For her meal break, she clocked out at 9:07 p.m. and clocked back in at 9:37 p.m. When her shift ended, she noticed that she had $40.43 in tips. She thought it was too much given the number of transactions she handled. But Renanza said the counter was busy while she was on break. She asked the security guard what she should do. He told her that the tips were hers, take them home. She took the tips home and never mentioned her concern about the size of the tips to management.

While reviewing voucher transactions, Christenson identified two suspicious voucher transactions from January 13, 2008. One transaction occurred at 7:02 p.m. and revealed a $15.13 gratuity on a $4.50 check. The other transaction occurred at 9:52 p.m. and revealed a $8.90 gratuity on a $10.25 check. The transactions were linked to the same cash register log-in number, 317. Christenson reported the transactions to the hotel's controller for investigation. The controller, in turn, sent the vouchers to LeSage for answers.

On January 19, 2008, Gonzalez went to the emergency room due to blood in her urine. She called and informed Roberts. Roberts told her to take the next two days off. Gonzalez worked on January 22, 2008. Then, on January 25, 2008, Jarecki called Gonzalez and said that they needed to meet.

Gonzalez met with Nader and Jarecki and they showed her the two voucher transactions that had been flagged by Christenson. Each had a value of $20 for meals, $1.65 for tax and $0.00 for gratuity. They asked Gonzalez why they included tips. She said she did not remember ringing the vouchers up; other people used her MICROS card when she was away from her station; she was not the one who processed the vouchers; and the vouchers were on the side of the cash register with the receipts when she returned from lunch. She told them about the $8 tip that Roberts had to void. Jarecki asked Nader if the cash register could be responsible. He stated: "No. The machine doesn't automatically calculate tips."

After the meeting, Jarecki asked an employee to show her how to use the cash register and how to process a voucher. She asked if the machine was capable of calculating tips and was told no. According to the employee, "You have to put it in manually yourself."

Subsequently, Gonzalez met with Nader and LeSage. They showed Gonzalez her time card and said she was working at the time of the transactions. Gonzalez stated that she thought that the tips had been automatically added.

In a third meeting, Nader and LeSage informed Gonzalez that they had videotape of her at the register at the time of the two voucher transactions. Gonzalez asked to see the videotape and the two vouchers. LeSage said that she could not show them to Gonzalez because they were hotel property.

LeSage and Nader terminated Gonzalez's employment. The videotape was automatically erased 30 days after it was created.

The complaint

Gonzalez sued and alleged that when IHG and Nader learned she was pregnant, they harassed her and terminated her employment, "with her pregnancy being a motivating factor." Gonzalez asserted causes of action for sex discrimination and harassment in violation of the Fair Employment and Housing Act, and termination in violation of public policy. She requested awards of compensatory and punitive damages.

The motion for summary judgment by IHG and Nader

In their motion for summary judgment, IHG and Nader maintained that Gonzalez was terminated from her employment because she pocketed and failed to report unauthorized gratuities. As a result, they argued: (1) Gonzalez could not establish a prima facie case of pregnancy discrimination; (2) the evidence established that IHG terminated her employment for legitimate, nondiscriminatory reasons; and (3) Gonzalez could not establish pretext. Next, they argued that nothing IHG or Nader did amounted to unlawful harassment due to Gonzalez's pregnancy. Last, they argued that Gonzalez's prayer for punitive damages should be stricken because she could not raise a triable issue as to fraud, oppression or malice.

In support of the motion, LeSage declared: The hotel takes a "zero tolerance" approach to "even the suspected mishandling of hotel money or property—no matter what the amount." LeSage personally took part in the decision to terminate hotel employees "who were suspected of mishandling just a small amount of the [hotel's] money or property." For example, she terminated an employee after determining that the employee misappropriated two donuts and a slice of pizza. She terminated another employee for taking a shampoo amenity, and another employee she suspected of mishandling $40. In November 2007, while Gonzalez was employed, LeSage made the decision to terminate a foodservice employee who mishandled two vouchers that resulted in the employee receiving just $4 in gratuities that he did not earn. Gonzalez's termination was no exception to the hotel's approach to the suspected mishandling of hotel money or property.

Regarding the investigation, LeSage explained as follows. The controller sent her two suspicious voucher transaction receipts for transactions on January 13, 2008. The transactions took place at 7:02 p.m. and 9:51 p.m. She reviewed Gonzalez's time records and determined that Gonzalez clocked out for a meal break from 9:07 p.m. to 9:37 p.m. LeSage then reviewed the time-stamped surveillance video of Gonzalez's workstation. Gonzalez was visible on the videotape and was at her cash register at the time of the two suspicious transactions.

According to LeSage, human resources "conducted no less than three follow-up interviews with [Gonzalez] in order to ascertain [Gonzalez's] side of the story. When I personally met with [Gonzalez], I felt that [Gonzalez's] story was inconsistent. At times, [Gonzalez] refused to take any responsibility for the incident only to then change her story and give excuses as to how the gratuities purportedly happened. These include [Gonzalez's] statements that (1) she was improperly trained on how to ring up the transactions; (2) she was not the person who rang up the two transactions; (3) she may have been the person who rang up the transactions; and (4) and if she was the one that rang up the transactions[,] then the cash register must have automatically entered in the

disproportionate gratuity amount." LeSage concluded that Gonzalez pocketed the improper gratuities.

Finally, LeSage declared that she and Nader "concluded that [Gonzalez's] employment could no longer continue. Gonzalez's actions (or lack thereof) led me to believe that [Gonzalez] either acted dishonestly or was incredibly careless about her work. The decision to terminate [Gonzalez's] employment is entirely in line with actions that the [hotel] has taken before."

Nader declared that he was troubled that Gonzalez took home $40.43 in gratuities for January 13, 2008, "despite the fact that there was far too much in tips for that evening." He pointed out that she never told management that she thought she was receiving too much money.

In her opposition, Gonzalez asserted that her pregnancy was a motivating factor in her termination. She complained that IHG's investigation of her alleged misconduct was incomplete. Her human resources expert, C.R. Holmes (Holmes), declared: "The investigation by IHG and its [Human Resources] Director of the events leading to the termination of [Gonzalez] was incomplete and poorly executed. In her deposition, [Human Resources] Director [LeSage] states that her investigation consisted only . . . of viewing a security videotape and speaking to the Controller. This company executive did not . . . speak to the actual person(s) in the Accounting Department who received the money from the cashiers. By not speaking to those accounting [employees] directly involved in the incoming processing of cashier monies, [LeSage] could neither confirm nor deny the integrity of the chain of custody of the funds, the accuracy of the funds turned in, or who else also may have had access to the register or funds. This is contrary to logical investigative practice where you interview all reasonably available witnesses or possible witnesses including co-workers. [¶] . . . It is totally improper to destroy a key piece of evidence (the purported security video) which was the primary basis for terminating a female employee who the company knew to be pregnant. [¶] . . . It is totally improper for the Director of Human Resources **not** to investigate the statements made by the employee being investigated."

The trial court granted summary judgment. It ruled: (1) Gonzalez's sex discrimination claim failed because she could not establish a prima facie case, IHG had a legitimate reason for terminating her, and there was no evidence to suggest pretext; (2) Gonzalez's sexual harassment claim failed because the actions taken by IHG and Nader were not severe or pervasive enough to create a hostile work environment; and (3) Gonzalez could not establish that the conduct of IHG and Nader rose to the level of malice, fraud or oppression.

Judgment was entered for IHG and Nader.

This timely appeal followed.

STANDARD OF REVIEW

We review an order granting summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.)

DISCUSSION

1. Pregnancy discrimination.

Gonzalez argues that summary judgment should have been denied because there was sufficient direct and indirect evidence that her pregnancy was a substantial factor in IHG's decision to terminate her employment.

We turn to the issues.

a. <u>The law.</u>

An employment discrimination claim involves a three prong analysis. The plaintiff must make a prima facie case that (1) she was a member of a protected class, (2) she was performing competently, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel National,*

Inc. (2000) 24 Cal.4th 317, 354 (*Guz*).) Once the plaintiff meets this burden, there is a presumption of discrimination and the employer has the burden of articulating a legitimate, nondiscriminatory reason for its action. (*Id*. at pp. 355–356.) If the employer sustains its burden, the plaintiff must show that the proffered justification was a pretext for discrimination. (*Id*. at p. 356.)

Consistent with this three pronged analysis, summary judgment must be denied if there is a triable issue as to whether the reasons articulated by the employer for its action are pretextual. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1062; *Guz, supra*, 4 Cal.4th at 357 [if a defendant moving for summary judgment articulates a legitimate, nondiscriminatory reason for its action, the plaintiff must "rebut this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred"].)

"'"[T]he plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" [Citation.]' [Citations.] 'With direct evidence of pretext, "'a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial.' [Citation.] The plaintiff is required to produce 'very little' direct evidence of the employer's discriminatory intent to move past summary judgment." . . .' [Citations.]" (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 553.) To establish indirect evidence of discrimination, "[a]n employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the reasons offered by the employer for the employment decision that a reasonable trier of fact could rationally find the reasons not credible, and thereby infer the employer did not act for the stated nondiscriminatory purpose. [Citation.]" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1007.) "'Pretext may . . . be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination.' [Citation.]" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 271–272.) It may also be inferred

from an "employer's failure to interview witnesses for potentially exculpatory information" (*id.* at p. 280) or if the person investigating the plaintiff's job performance "[has] an axe to grind" (*id.* at p. 277).

To win a discrimination case, a plaintiff must prove that her protected status was a substantial factor in the adverse employment decision. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 375 [applying the standard to race discrimination].)

b. Analysis.

The trial court ruled that Gonzalez could not establish a prima facie case or pretext. The ruling must stand.

There is no direct evidence of animus or pretext. In other words, there is no "evidence which proves [discrimination] without inference or presumption." (*Trop v. Sony Picture Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1145 (*Trop*) [applying the three prong test to summary judgment granted for the employer in a pregnancy discrimination case].) For example, there is no evidence that Christenson knew Gonzalez or of her pregnancy when flagging the two suspicious voucher transactions. Nor is there evidence that the controller knew of Gonzalez's pregnancy when he sent the matter to LeSage for investigation. As for LeSage, she was perfectly accommodating when Gonzalez requested forms for a pregnancy leave. LeSage went so far as to tell Gonzalez she could have seven months off. Neither is there evidence of animus on the part of Jarecki. She told Gonzalez to take time off upon hearing that she was in the hospital. Significantly, Gonzalez cannot point to any evidence that Christenson, LeSage or Jarecki ever said anything disparaging about women who are pregnant, or that they admitted discriminating against Gonzalez. We acknowledge that there is hearsay evidence that Nader was angry when he learned of Gonzalez's request for a schedule change. Also, Gonzalez claims that Nader stopped talking to her. But the reasons and specific context for Nader's conduct and behavior are unknown, and there is no evidence that he admitted that he discriminated. Moreover, we do not know what Renanza said to Nader. And we

do not know whether Renanza's statement to Gonzalez was based on a fabrication or misunderstanding.

In addition, we conclude that the record lacks credible and substantial indirect evidence of animus or pretext. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806 (*Horn*) ["'to avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual'"].) Nothing is implausible about IHG's stated reason for terminating Gonzalez's employment. The evidence shows that Gonzalez took home $40.43 in tips on January 13, 2008, even though she thought the amount was large. She never alerted her supervisors. Two large tips were associated with vouchers that did not authorize tips and those vouchers were processed while Gonzalez was clocked in. Moreover, they were connected to Gonzalez's log-in number. LeSage said that she reviewed the surveillance tape and saw Gonzalez at her station during the transactions. Per LeSage's deposition testimony, every time there was a complaint about an employee who mishandled money resulting in a loss, the employee was terminated from employment. Jarecki investigated the cash register and was informed that tips are not automatically calculated. These facts suggest that IHG had a lawful and logical reason to treat Gonzalez as it did, and that its decision was consistent with its policy and practice. In the words of *Trop*, IHG's reasons "were creditable on their face." (*Trop, supra*, 129 Cal.App.4th at p. 1149.)

Nader learned of Gonzalez's pregnancy and request for a schedule change in mid-November 2007. Gonzalez had no trouble in her job for about two months, i.e., she was not terminated, demoted, etc. Further, she obtained the schedule change she requested. Presumably, the changed was approved by Nader. We conclude that Nader's alleged anger and behavior are too remote and the nature of his conversation with Renanza is too unclear to permit a "'reasonable trier of fact [to] conclude that [IHG] engaged in intentional discrimination'" (*Horn, supra*, 72 Cal.App.4th at p. 807), especially given that the decision to terminate was not his alone.

Gonzalez suggests that IHG's stated reason for her termination is inconsistent because it turns a blind eye to theft by its supervisors. She contends that this establishes pretext. The evidence, however, shows that IHG has a history of terminating employees for mishandling tips and hotel property. In addition, there is no evidence that LeSage and Nader were aware of any supervisor theft. Gonzalez's suggestion that IHG knowingly treated her in an inconsistent manner is unsupported by the record. Next, she complains that Roberts mishandled money but did not get punished, and that Roberts and Renanza instructed that vouchers should be processed for the full amount even when a customer ordered less. Whether that is true, we will not speculate because there is no evidence that nonpregnant employees similarly situated to Gonzalez (cashiers and other nonsupervisors) received more favorable treatment. Nor is there evidence that LeSage and Nader knew about any supervisor misconduct.

Animus and pretext cannot be determined from the timing of the termination. This is not a situation in which a whistleblower is suddenly terminated after years of receiving stellar reviews. The investigation was triggered by Christenson who, as far as the record is concerned, was ignorant of Gonzalez's pregnancy. In other words, the trigger was in no way suspicious. Pretext also cannot be inferred from Gonzalez's job performance. Whether she deliberately added two tips to the two voucher transactions or kept them after they were automatically added is beside the point. She was not entitled to keep the two tips but nevertheless did.

We note that the declaration of Holmes cannot save the day for Gonzalez. Though she complains that LeSage should have interviewed more people and that the videotape should have been preserved, Gonzalez never denied taking the two tips home. She also never returned the tips. At best, Gonzalez suggests that someone other than her might have processed the two vouchers, or that the cash register automatically added the unauthorized gratuities, and that the only reason LeSage did not investigate these possibilities was discriminatory animus. However, IHG did not need any more information before making a decision because Gonzalez conceded that she took the tips home and did not report them.

Finally, *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201, puts an end to Gonzalez's suggestion that her prima facie case is a question for the jury rather than summary judgment. The *Caldwell* court held that "whether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Id.* at p. 201.)

2. Other issues.

Gonzalez makes no argument regarding sexual harassment or termination in violation of public policy. Any challenge is waived. And, in the absence of a supporting cause of action, punitive damages are moot.

DISPOSITION

The judgment is affirmed.

IHG and Nader shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ